



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

200737045

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

JUN 20 2007

T. EP. RA. T. A2

Re:

Company =

This letter is in response to your request for a ruling concerning the Plan which was submitted on April 28, 2005. Specifically, you asked us to rule on the following issues:

- (1) The phrase "within the last two years" referred to in section 404(a)(1)(D)(ii) of the Internal Revenue Code ("Code") refers to the taxable year.
- (2) The amendment adopted on December 13, 2002, may be taken into consideration in order to calculate the deductible amount of the contribution due to the Plan for the taxable year ending December 31, 2004.

The Company sponsors the Plan, a defined benefit pension plan with a plan year ending October 14. The Company's taxable year is the calendar year. The Company determines the deductible limit for a taxable year by reference to calculations for the plan year ending within the taxable year as allowed by section 1.404(a)-14(c) of the Income Tax Regulations ("regulations"). The Plan covers less than 100 participants.

On December 13, 2002, as a consequence of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), the Company amended the Plan to adopt certain sample amendments. One of these amendments ("amendment") was to allow for benefit increases under the Plan resulting from increases in the limitations under section 415(b) of the Code. The plan administrator elected that the amendment be deemed to be effective for the plan year ending October 14, 2002, in accordance with section 412(c)(8) of the Code.

Section 404 of the Code, before and after the changes made by the Pension Protection Act of 2006 ("PPA '06"), generally provides rules concerning the deduction for contributions to plans of deferred compensation. Section 401(a)(1) provides the general rules for the deduction for contributions of an employer to a pension trust.

Section 404(a)(1)(D)(i) of the Code before the changes made by PPA '06 provides that in the case of a defined benefit plan, the maximum amount deductible shall not be less than the unfunded current liability under section 412(l). PPA '06 changed the maximum amount deductible to be not less than 150% of unfunded current liability.

Section 404(a)(1)(D)(ii) of the Code, before and after the changes made by PPA '06, provides that for defined benefit plans with less than 100 participants, unfunded current liability shall not include the liability attributable to benefit increases for highly compensated employees (as defined in section 414(q)) resulting from a plan amendment which is made or becomes effective, whichever is later, within the last 2 years.

Section 412(c)(8) of the Code, before the changes made by PPA '06, provides that any amendment applying to a plan year which

- (A) is adopted after the close of such plan year but no later than 2 1/2 months after the close of the plan year (or, in the case of a multiemployer plan, no later than 2 years after the close of such plan year),
- (B) does not reduce the accrued benefit of any participant determined as of the beginning of the first plan year to which the amendment applies, and
- (C) does not reduce the accrued benefit of any participant determined as of the time of adoption except to the extent required by the circumstances,

shall, at the election of the plan administrator, be deemed to have been made on the first day of such plan year.

Section 412(l) of the Code, before the changes made by PPA '06, provides the additional funding requirements for plans which are not multiemployer plans.

Section 414(q) of the Code, before and after the changes made by PPA '06, provides the definition of highly compensated employee ("HCE").

Section 1.404(a)-14(c) of the regulations provides that if the plan year of the plan and the taxable year of the employer do not coincide, the deductible limit for the taxable year of the employer is permitted to be determined as any one of the following alternatives: (1) the deductible limit determined for the plan year beginning in the taxable year, (2) the deductible limit determined for the plan year ending in the taxable year, or (3) a weighted average of alternatives (1) and (2).

Notice 2007-28, 2007-14 I.R.B. 880, addresses, in question and answer format, the deductibility of certain contributions to qualified defined benefit pension plans under section 404(a)(1) of the Code and the deductibility of certain contributions to a combination of plans under section 404(a)(7) of the Code. It provides guidance on

certain of the changes made to section 404 of the Code by PPA '06 that are effective for taxable years of the employer beginning after December 31, 2005.

Q & A-5 of Notice 2007-28 provides that for purposes of section 404(a)(1)(D)(ii) of the Code, the adoption of a new plan will not be treated as a plan amendment only if the employer did not maintain a defined benefit plan covering any HCE covered by the new plan during the past 2 years. It gives the following example: for an employer with a taxable year that is the calendar year, if an HCE was covered by a defined benefit plan of the employer at any time during 2004 or 2005, a new plan established during the 2006 taxable year that covers that HCE would be considered a plan amendment for purposes of section 404(a)(1)(D)(ii) of the Code.

Under section 404(a)(1)(D)(ii) of the Code, before and after the changes made by PPA '06, unfunded current liability shall not include the liability attributable to benefit increases for HCE's resulting from a plan amendment which is made or becomes effective, whichever is later, within the last 2 years. Under Q & A-5 of Notice 2007-28, "within the last 2 years" is interpreted as the last 2 taxable years prior to the taxable year for which current liability is being determined.¹ Thus, for the taxable year ending December 31, 2004, unfunded current liability shall not include the liability attributable to benefit increases for HCE's resulting from a plan amendment which is made or becomes effective for the taxable years ending December 31, 2002, and December 31, 2003.

Because the amendment was made on December 13, 2002, it was made within the taxable year of the Company ending December 31, 2002. The plan administrator elected that the amendment be deemed effective for the plan year ending October 14, 2002. The deductible limit for the taxable year ending December 31, 2004, would be determined by reference to the plan year beginning October 15, 2003, and ending October 14, 2004. Even if section 404(a)(1)(D)(ii) of the Code was considered to refer to plan years, the amendment adopted on December 13, 2002, was made within the two plan years prior to the plan year used to determine the deductible limit. Accordingly, the increases in liability as a result of the amendment attributable to HCE's may not be taken into consideration in order to calculate the deductible limit under section 404(a)(1)(D)(ii) of the Code applicable to the taxable year ending December 31, 2004.

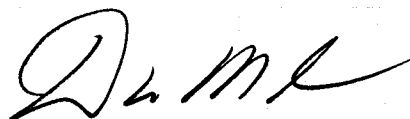
This ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

We have sent a copy of this letter to the
and to the

¹ It should be noted that while Notice 2007-28 was published after the amendment, the same reasoning used to reach this conclusion in Q & A-5 holds in this instance since section 404(a)(1)(D)(ii) of the Code was not amended by PPA '06.

If you require further assistance in this matter, please contact

Sincerely yours,

A handwritten signature in black ink, appearing to read "D. M. Prestia". The signature is fluid and cursive, with the first name "D." and last name "Prestia" clearly distinguishable.

Donna M. Prestia, Manager
Employee Plans Actuarial Group 2